No. 22379

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND
STEWART UDALL, SECRETARY OF THE
INTERIOR OF THE UNITED STATES OF AMERICA,

Appellants

v.

JACK A. WALKER, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE UNITED STATES AND STEWART UDALL, SECRETARY OF THE INTERIOR, APPELLANTS

CLYDE O. MARTZ,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

JAY F. BATES,
Assistant United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

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OPINION BELOW

The memorandum opinion of the district court (R. 132-137) is not reported.

JURISDICTION

Jurisdiction was sought to be invoked under the Administrative Procedure Act, then 5 U.S.C. sec. 1009 (now codified at 5 U.S.C. secs. 703 et seq.), and 28 U.S.C. sec. 1346 (R. 5). The district court based jurisdiction upon the Administrative Procedure Act (R. 132). Appellants contend that the court had no jurisdiction of the action. Judgment was entered on July 3, 1967 (R. 4, 137). Notice of appeal was filed August 25, 1967 (R. 44, 138). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

In 1955, Congress provided for stricter enforcement of mining law restrictions, including confinement of possession of claims to use for mining purposes. In 1962, the Mining Claims Occupancy Act authorized the Secretary of the Interior to convey fee title or a lesser interest of a maximum of five acres (reserving minerals to the United States) surrounding residences on invalid mining claims which had been continuously occupied since 1955. The Secretary rejected Walker's application for a fee patent. The questions presented are:

1. Whether the District Court for Idaho had jurisdiction of a suit brought against the United States and the Secretary of the Interior to overturn the rejection of the application and, if so,

2. Whether, in view of the wide discretion granted the Secretary and the facts of this case, showing little occupation and a purpose to pursue mineral exploration in the national forest, the court was warranted in vacating the Secretary's decision and in directing the holding of a hearing.

STATUTES INVOLVED

The Mining Claims Occupancy Act of October 23, 1962, P.L. 87-851, 76 Stat. 1127, provides:

Section 1 (30 U.S.C. sec. 701)

> The Secretary of the Interior may convey to any occupant of an unpatented mining claim which is determined by the Secretary to be invalid an interest, up to and including a fee simple, in and to an area within the claim of not more than (a) five acres or (b) the acreage actually occupied by him, whichever is less. The Secretary may make a like conveyance to any occupant of an unpatented mining claim who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all rights in and to such claim which he may have under the mining laws. Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 702 of this title, who applies therefor within five years from October 23, 1962, and upon payment of an amount established in accordance with section 705 of this title.
>
> As used in this section, the term "qualified officer of the United States" means the Secretary of the Interior or an employee of the Department of the Interior so designated by him: Provided, That the Secretary may delegate his authority to designate qualified officers to the head of any other department or agency of the United States with respect to lands within the administrative jurisdiction of that department or agency.

Section 2 (Id., sec. 702)

For the purposes of this chapter a qualified applicant is a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

Section 3 (Id., sec. 703)

Where the lands for which application is made under section 701 of this title have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may convey an interest therein only with the consent of the head of the governmental unit concerned and under such terms and conditions as said head may deem necessary.

Section 5 (Id., sec. 705)

The Secretary of the Interior, prior to any conveyance under this chapter, shall determine the fair market value of the interest to be conveyed, exclusive of the value of any improvements placed on the lands involved by the applicant or his predecessors in interest. Said value shall be determined as of the date of appraisal. In establishing the purchase price to be paid by the applicant for the interest, the Secretary shall take into consideration any equities of the applicant and his

predecessors in interest, including conditions of prior use and occupancy. In any event the purchase price for any interest conveyed shall not exceed its fair market value nor be less than $5 per acre. The Secretary may, in his discretion, allow payment to be made in installments.

Section 7 (Id., sec. 707)

In any conveyance under this chapter the mineral interests of the United States in the lands conveyed are reserved for the term of the estate conveyed. Minerals locatable under the mining laws or disposable under sections 601-604 of this title, are withdrawn from all forms of entry and appropriation for the term of the estate. The underlying oil, gas, and other leasable minerals of the United States are reserved for exploration and development purposes, but without the right of surface ingress and egress, and may be leased by the Secretary under the mineral leasing laws.

The Act of October 5, 1962, 76 Stat. 744, provides:

Section 1 (28 U.S.C. sec. 1361)

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 2 (28 U.S.C. sec. 1391(e))

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may,

> except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The Administrative Procedure Act as codified provides (5 U.S.C. sec. 703):

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

STATEMENT

This is an appeal by the United States and the Secretary of the Interior from an order purporting to set aside a

decision of the Secretary of the Interior which denied an application of appellee to purchase a five-acre tract of land within the Payette National Forest and directing that the applicant be afforded an administrative hearing (R. 132-137).

The amended complaint, filed in January 1967, naming the United States and the Secretary of the Interior as defendants, alleged location of the Bobbin Quartz Mining Claim in Idaho in 1950 and the filing in January 1964 of an application under the Mining Claims Occupancy Act, accompanied with a relinquishment of Bobbin location (R. 24). The complaint alleged rejection of the application in May 1964 without a hearing and unsuccessful appeal to the Bureau of Land Management and the Secretary. It was alleged that the decision was wrong, was reached without a public hearing and was arbitrary, capricious and not supported by substantial evidence. The relief sought was reversal of the departmental decision, allowance of the application for a patent and direction of "such orders or deeds as may be required to give plaintiff herein complete relief" and other appropriate equitable relief (R. 23-26). By answer defendants denied error, denied jurisdiction to grant relief and also denied existence of consent to suit

(R. 27-29). The defendants moved in May 1967 for summary judgment, attaching a copy of the administrative record (R. 32-33). The plaintiff filed a cross-motion for summary judgment (R. 118-119) and, after hearing, the motion of the plaintiff was granted (R. 131-137). This appeal followed.

The administrative record reveals the following facts: Walker's application, dated January 1964, stating his address as Yellow Pine, Idaho, claimed he was the original locator and sole owner of the Bobbin claim on Logan Creek (approximately 28 miles from Yellow Pine) which had, however, been tunnelled by others earlier; that he had fixed up a cabin and made improvements on the claim; that in 1955 he "got the old workings opened" and found the ore bodies too small and low grade to be economically workable; that he had found and staked a low grade gold-silver deposit high on the mountain, plus a high grade antimony deposit adjacent to it; and that he requested a five-acre fee patent because: "This is still the only home I own, (although lack of work in the area has forced me to be absent from it quite a bit, especially in the winter months) when I am someday able to put the big gold-silver deposit into production or the antimony, the Bobbin will have to be my base of operations and production will continue long after I am dead

and gone, and after all the work I have put into it I would like to see it go into the hands of my children eventually. This place is the only place I can return to and feel contented, as though I have really come 'home.'" Attached was a list of the work done and improvements made which, for the years 1957-1962, described only assessment work, "cat work on road" or "road grader on road," to a total of no more than $127 in any one year (R. 36-39).

By decision dated May 14, 1964, the Land Office manager rejected the application, his decision stating (R. 46):

> The Forest Service reports that for the most part the statements made by the applicant are correct. However, they do not agree that the cabin on the claim has been a principal place of residence since 1950 for the applicant. They report that Mr. Walker resides in Vale, Oregon most of the year and for a two or three month period in the summer, resides in the Yellow Pine - Big Creek area. When working in the Big Creek area he resides in the cabin on the claim, and when working in the Yellow Pine area he resides on property he owns at the town Yellow Pine. The District Forest Ranger of the Big Creek District of the Payette National Forest contends that Mr. Walker's principal place of residence when he is in the "back country" is at Yellow Pine rather than on the Bobbin mining claim.
>
> Since Mr. Walker's principal place of residence is at Vale, Oregon and for two or three months of the year is at Yellow Pine, Idaho he is not a qualified applicant under the Act of October 23, 1962. For this reason the application is rejected.

The detailed report of the Forest Service ranger made in March 1964 indicated that Walker lived on the claim no more than six months in the six years preceeding 1964 (R. 77-81). A report was also made by the mining valuation engineer, dated December 16, 1963, who, together with the District Ranger, had visited the claim in August 1963 to determine the validity of the mining claim at the request of the Forest Supervisor's office. This report stated that Walker was contacted at the time and that (R. 80):

> Mr. Walker asked for information regarding the mining claims occupancy act of 1962 (P.L. 87-851). I gave Mr. Walker all information I had regarding the act and advised him to contact the Bureau of Land Management in Boise for further information. Mr. Walker has contacted officials of the BLM, but has not yet made application under the act.

Walker appealed by letter received May 20, 1964. He claimed that the Act does not say "the" principal place of residence but rather "one of the" principal places of residence and that the area was snowed in seven to eight months of the year. He spoke of improved mining prospects and said (R. 50):

> I can furnish favorable recommendations by mining engineers on this property, and have since uncovered a very good silver vein with a width of eleven feet on this same property which will make a mine of itself if its values hold up for a good distance along the strike of the vein.

While admitting that he owned two lots at Vale, he denied living there and said (R. 50-52):

> When lack of income in the mining area of Big-Creek-Yellow Pine, Idaho forced me to seek other means of income to supplement, I began to bid on small contract jobs about the country, and I have had several contracts with the Bureau of Land Management in Oregon, with the district office being at Vale, Oregon. In fact the Saturday before last, the 9th of May 1964, I finished up my last contract with them. When working with the Vale BLM district I usually maintain a Vale forwarding address to which my mail is forwarded from Yellow Pine, Idaho. In the last few years when winter shut everything off in the Big Creek-Yellow Pine area my forwarding address has been wherever I found work in the winter months, such as, Payette, Idaho, Boise, Idaho, Vale, Oregon, even McDermitt, Nevada for a short time.
>
> * * * * *
>
> I have never resided on property I own at Yellow Pine, Idaho. I have owned a small piece of ground there for about two years, but it has had no dwelling on it nor have I pitched a tent on it or ever resided on it. There is no water on or near it and poor prospects of getting water without great expense. I have rented a cabin off and on at Yellow Pine for my use when working in the area, and last year had the use of teacherage as living quarters. Probably I will have the use of the teacherage again this year when I am in that area. <u>It is true as stated by the Forest Service that I am at Yellow Pine more than at the mining claim</u>, but false that I am residing on my own property. I have put a small oil storage shed on the property and am putting a building on it for a

storage building, but there is no domicile on it. The post office at Big Creek was removed some years ago, and it is necessary that I have fairly good mail service because of my contracting business and so had to make Yellow Pine, Idaho, the nearest post office to the Big Creek area a business headquarters. When I can maintain enough mining and contracting activity in the Big Creek area to dispense with outside work I can get by with what mail service there is, and possibly an increase in mining there would bring the return of the post office.

The essence of what I am saying is that I have two principal places of residence. The mining claim in question and Yellow Pine, Idaho. Otherwise my forwarding addresses are wherever outside work temporarily takes me. I stated in my application for patent and I now restate, the dwelling upon the claim is the only home I own.

Further inquiry of the Forest Service led to a report of March 4, 1965, which stated (R. 65):

As Mr. Walker has stated, his improvements on the Bobbin mining claim are used only in connection with performing annual assessment and development work on his nearby claims and while doing some assessment work for others in the general area. Ranger Dodds has been on the Big Creek Ranger District the past seven years, and he reports that during that period Mr. Walker has spent only two or three months a year in the Yellow Pine-Big Creek area. During these periods, as stated in his appeal, Mr. Walker's residence has been mostly in Yellow Pine for business reasons.

By opinion of April 27, 1965, Walker's appeal was rejected on the ground that he had not shown satisfaction of the residence requirements of the Act. As to hearing, this opinion said (R. 68):

> The appellant indicates he would "welcome" a hearing. However, there is no statutory or regulatory requirement for a hearing in cases involving a determination of the type here, and the appellant has not been limited in his right to submit evidence substantiating his assertions.

Walker appealed to the Secretary, claiming that there was an issue of fact and that the Forest Service was guilty of bearing false witness. Again reviewing some of the facts, he said (R. 71):

> Last fall I brought out a large mill sample of ore from one of my two nearby properties and the mill test results are very favorable, consequently as money will permit I will be pushing this property into production as soon as possible. This means that even if a steady source of outside work doesn't become available in the area I will eventually have my independent livlihood there. It has become my opinion that the Forest Service is trying to hamper all mineral development within the National Forests.

Also, he stated (R. 72):

> P.S. Enclosed is an article by the Geological Research naming antimony deposits of note, among which is mentioned my property which I am developing towards production, on Logan Creek.

Attached were affidavits that Walker had sold his lots in Vale, Oregon, in 1964; that he had not voted there in the last five years (R. 74); and that Walker was a voting resident of the Big Creek-Yellow Pine area (R. 75).

The rejection was affirmed on April 27, 1965 (R. 85-91). All of the facts were examined in detail. It ruled that the term "principal place of residence" in the 1962 Act did not have a fixed judicially established meaning; that whether the mining claim was a principal place of Walker's residence required interpretation of the law and that "it does not appear that there is presently any dispute as to a material fact which would warrant the granting of a hearing" (R. 87). The decision then discussed the facts bearing on the question at some length and concluded that Walker had failed to show the required residence continuously for seven years prior to 1962. After referring to the purposes and legislative history of the Act, the decision concluded (R. 91):

> In other words, the purpose of the law is to preserve homes for qualified occupants of mining claims, places where they have lived for years and from which their forced removal because of the invalidity of the mining claims would be a real hardship. There was no solicitude expressed by the Congress for the person who has a home elsewhere and who merely occupied the mining claim on a limited basis or for a limited purpose. Such a person would not be uprooted from a home if denied the right to occupy the claim.
>
> When viewed in this light, appellant's own showing fails to establish that his cabin on the claim was a principal place of residence within the meaning of the statute. It indicates no more than that he occupied the cabin only when he was working on mining properties in the vicinity. When notso engaged and when conducting his principal work or, presumably, when not working at all, he lived elsewhere than on the claim. Denial of relief to him under the act would not work the hardship on him of removal from a long-established home.

SPECIFICATIONS OF ERRORS

The district court erred:

1. In assuming jurisdiction of the case.

2. In overturning the decision of the Secretary of the Interior.

3. In holding that the plaintiff was entitled to a hearing.

4. In holding that the facts required a hearing.

5. In remanding the case to the Secretary of the Interior for further proceedings.

6. In denying defendants' motion for summary judgment.

7. In holding that a person invoking the Mining Claims Occupancy Act has rights comparable to those of a mining entryman or a homesteader.

SUMMARY OF ARGUMENT

I

A. The United States did not consent to this suit since the Administrative Procedure Act is not a consent to sue the United States in derogation of sovereign immunity nor is it a waiver of that immunity.

B. The District of Idaho, absent congressional consent, had no jurisdiction of the Secretary of the Interior since, like other cabinet officers, his official residence, for purposes of suit, is the District of Columbia.

C. The mandamus statute of 1962, 28 U.S.C. secs. 1361, 1391(e), consented, in a limited class of cases, to jurisdiction of federal district courts throughout the country over the Secretary of the Interior. That consent does not vest the district court with jurisdiction of this case, since there cannot, under any view, be said to be a duty, equivalent to a positive command, owing to the plaintiff.

II

There are several independent reasons why rejection of the Secretary's decision was not warranted in this case.

A. The 1962 Act was a pure gratuity passed to authorize the alleviation of hardship on some individuals who had established homes for years on invalid mining claims. The Secretary of the Interior was given complete discretion as to whether and to what extent, up to the statutory maximums, some equitable relief should be granted to deserving persons. The legislative history is explicit that such was the intention of Congress, the distinction between permissive and mandatory legislation being repeatedly made. Consequently, Walker does not possess any statutory right empowering him to challenge the Secretary's rejection.

B. Walker asserted throughout the proceedings a past and future purpose of use of the five acres sought as a base for mining explorations. This is entirely contrary to the purposes of the 1962 Act, which was designed not to promote mining activity, but to prevent eviction of residents from the homes, and which reserved minerals to the United States. Congress had no intent to enlarge the existing laws as to mining development, and use of the 1962 Act for such uses perverts its purposes. Moreover, in seeking national forest lands, Walker is subverting the purpose of the 1962 Act, which Congress intended should apply "only if it [the land] is not needed for further governmental purposes." 108 Cong. Rec. p. 19647.

C. The record fails to show occupancy as a residence for seven years prior to 1962 of the nature contemplated by the Act. Most of Walker's complaints against the administrative decisions concerned actions after 1962 and failed to show that he was to be evicted from a principal residence. It is plain that, regardless of reason, he had not resided on the claim for a substantial part of his time since 1955. At the very least, this administrative conclusion is supported by the facts and should not be overturned by the courts.

D. The direction of a hearing was not justified. There is no right to hearing given in the statute. And a hearing would be pure formality, since the evidential facts are undisputed. Only the conclusion whether the claim was a principal place of residence within the meaning of the 1962 Act is debated.

ARGUMENT

I

THE DISTRICT COURT HAD NO JURISDICTION OF THIS CASE

This suit originally named only the United States as defendant and asserted that jurisdiction rested in the Administrative Procedure Act and 28 U.S.C. sec. 1346 (R. 5). The Secretary of the Interior was added as a defendant by amendment but no change was made to the allegation of jurisdiction (R. 23-24). The district court said that plaintiff "is seeking this review" pursuant to the Administrative Procedure Act (R. 132) and that (R. 133): "The defendants contend that the court is limited in regard to reviewing decisions of the Department of the Interior. The Ninth Circuit has rejected the defendants' contention. Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966)."

A. The United States has not consented to this suit. - There is no general form of action, common law or statutory, "for judicial review" of actions or decisions of agencies of the United States. Congress has never granted a consent to sue the United States as to all matters which may be characterized as agency action. The expression "judicial review," simply means that, in particular classes of cases under various specific authorizations or in particular modes in common law actions by which questions may arise, the courts have jurisdiction to go behind, or re-examine the actions that have been taken by a federal agent to a greater or lesser extent, depending on the case. Authority of the court to do so depends in each case on common law principles or authorization by Congress. Sovereign immunity is the basic common law principle, still applicable today, as recently recognized by Chief Judge Brown of the Fifth Circuit on March 26, 1968, when he said (Gardner v. Harris, F.2d):

> Blackstone said that the concept "that the king can do no wrong is a necessary and fundamental principle of the English constitution." Now in the 20th Century and in at least a part of the world long made safe for democracy the law persists in the view that seems to say that Blackstone is still right. And not even equity--the King's conscience--can help. As a result we must hold in this

> case that a private citizen, deprived of his property right of access to the historic Natchez Trace because of barricades erected by the Federal Superintendent of that highway project, has no remedy in equity for their removal, since to permit the suit would be to allow the citizen to sue the federal government without its consent, thereby breaching the wall of sovereign immunity. Thus plaintiff's remedy, confined to one at law, is not available in this suit for equitable relief only and this action against the Superintendent must be dismissed. [Footnotes omitted.]

Footnote 3 stated:

> With so much done, e.g., Suits in Admiralty Act, 46 U.S.C.A. §742; Public Vessels Act, 46 U.S.C.A. §782; Federal Torts Claims Act, 28 U.S.C.A. §1346; and more recently in 28 U.S.C.A. §§1361, 1391(e), to give the citizen access to a home-based Federal Court, frequently in cases that involve millions of dollars or which affect comprehensive governmental programs, the persistence with which the Government successfully asserts immunity as to property claims gives rise to several reactions. Not only does the result appear unusual to many, but the fact that Congress does not ameliorate these hardships appears even more unusual. The immunity is, however, very much alive. See Dugan v. Rank, 1963, 372 U.S. 609, 83 S.Ct. 999, 10 L. Ed. 2d 15; Malone v. Bowdoin, 1962, 369 U.S. 643, 82 S.Ct. 980, 8 L. Ed. 2d 168; Larson v. Domestic & Foreign Commerce Corp., 1949, 337 U.S. 682, 69 S.Ct. 1457, 93 L. Ed. 1628.

Walker in this suit seeks not money damages, but equitable relief designed to give him rights in property of the United States. Like the Fifth Circuit in Gardner, this Court has recognized that the United States has not consented to such suits. State of California v. Rank, 293 F.2d 340 (C.A. 9, 1961), aff'd on reh., 307 F.2d 96 (1962), aff'd on this point, Dugan v. Rank, 372 U.S. 609 (1963). In White v. Administration of General Services Admin. of U.S., 343 F.2d 444 (1965), this Court said (pp. 445-446):

> The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.
>
> If the fact that the United States is not named as a party in the suit could be overlooked and, though not named, it were treated as the real party in interest, which it is, the suit would still have to be dismissed, because the United States has not consented to be judicially compelled to perform its contracts. From the beginning of its history, the United States asserted and maintained complete immunity from suit until

> Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

After referring to several decisions concerning sovereign immunity, including Larson v. Domestic & Foregin Corp., 337 U.S. 682 (1949), it continued (p. 446):

> * * * In our case, if the appellants are given the relief which they seek, the appellees will have to sign the name of the United States of America to a deed conveying an interest in land. No one can do that as an individual. When considered in relation to the Larson opinion, the instant case is an a fortiori case.
>
> Even the dissenting Justices in Larson would have decided the instant case as we decide it. * * *

In United States v. Sherwood, 312 U.S. 584 (1941), the Court said (p. 588) that the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States" and (p. 591) that the Tucker Act jurisdiction to adjudicate claims against the United

States "does not extend to any suit which could not be maintained in the Court of Claims."

The district court relied upon the Administrative Procedure Act and upon the Adams and Coleman cases, supra. Neither case supports a theory of consent of the United States to suit. Coleman, which is now awaiting decision by the Supreme Court, was brought by the United States and, on rehearing in this Court, the Secretary of the Interior was joined as a party under the 1962 mandamus statute, 28 U.S.C. secs. 1361, 1391(e). The United States was not a party to Adams.

In White, supra, this Court held (343 F.2d at p. 447): "We find nothing in the statutes relating to declaratory judgments or administrative procedure which is helpful to the appellants." Chournos v. United States, 335 F.2d 918,919 (C.A. 10, 1964) declared:

> The Administrative Procedure Act, 5 U.S.C. § 1001 et seq., does not purport to give consent to suits against the United States. The Act provides that the person suffering legal wrong because of any agency action, or who is adversely affected or aggravated by such action, shall be entitled to judicial review. This review may be obtained only by an appropriate action in "any court of competent jurisdiction." Such an action may not be maintained if the court lacks jurisdiction upon any ground. [Footnotes deleted.]

The Eighth Circuit has recently concurred. Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529 (1967). It dismissed a suit against an Indian tribal corporation and the Secretary of the Interior for lack of jurisdiction, saying (p. 532):

> Secondly, plaintiffs assert that the District Court has jurisdiction over the Secretary of the United States Department of the Interior by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, 5 F.C.A. § 1009. The alleged "agency action" is assertedly found in 25 U.S.C.A. § 476, 25 F:C.A. § 476, which provides in part as follows: "Amendments to the constitution and bylaws may be ratified and approved by the Secretary * * *." (Emphasis supplied.) This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. Chournos v. United States, 335 F.2d 918 (10th Cir. 1964).

Accord Cyrus v. United States, 226 F.2d 416, 417 (C.A. 1, 1955); Aktiebolaget Bofors v. United States, 194 F.2d 145, 149 (C.A. D.C. 1951).

As these cases show, the A.P.A. does not purport to grant federal courts jurisdiction over any case, nor to consent

to suit against the United States in any form. Instead, it refers to "any applicable form of legal action * * * in a court of competent jurisdiction." 5 U.S.C. sec. 703. There is no room for construing this language as a waiver of sovereign immunity from suit, especially when the problem is approached in context of the facts that waivers of immunity have been intentional, specific and partial only and are accomplished by statutes consenting to suit which designate the terms upon which and the manner in which relief can be obtained against the United States. The restrictions upon consent limit the jurisdiction of the courts and cannot be waived, e.g., Dugan v. Rank, supra; Munro v. United States, 303 U.S. 36 (1938); Soriano v. United States, 352 U.S. 270, 273-274 (1957); Edwards v. United States, 163 F.2d 268 (C.A. 9, 1947). United States v. Sherwood, 312 U.S. 584 (1941), held that nothing in the Federal Rules of Civil Procedure constituted a consent to sue the United States, emphasizing the rule that "the terms of its [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit" (p. 586) and that the "consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted" (p. 590).

The principal appellate holding that the Administrative Procedure Act was a consent to suit is Estrada v. Ahrens, 296 F.2d 690 (C.A. 5, 1961), which did not deal with the language of the Act itself and that case represented the belief of the Fifth Circuit (296 F.2d at p. 698) that "The doctrine [of sovereign immunity] is wearing thin. Recent years have witnessed a great expansion of the individual's rights to seek redress against the government for wrongs committed by it." About a year earlier, the same Circuit had rejected the defense of sovereign immunity in Bowdoin v. Malone, 284 F.2d 95 (C.A. 5, 1960).

But the Fifth Circuit was shown the error of its position when, a year after Estrada, Bowdoin was reversed, Malone v. Bowdoin, 369 U.S. 643 (1962), and as noted above, it now recognizes, albeit reluctantly, its misconception of the law. Mulry v. Driver, 366 F.2d 544 (C.A. 9, 1966), was not brought against the United States but found "the necessary consent of the United States" under the A.P.A. (p. 547). It made no attempt to explain why Congress should be deemed to have reached the result (which is, so far as we know, completely novel in the law) of "consenting" to a suit to which the United States would not be

a party. The opinion actually does not discuss court jurisdiction but rather scope of review of administrative decision. And all of the discussion is dictum, since the court agreed that the action of the district court in dismissing the action was right.[1/]

B. Except for the 1962 mandamus statute the district court had no jurisdiction over the Secretary of the Interior. - In Ernst v. Secretary of the Interior, 244 F.2d 344 (C.A. 9, 1957), this Court, in summarily affirming, held that the Secretary of the Interior and the Solicitor of that Department could not be sued outside the District of Columbia, saying (pp. 345-346):

> The order to quash and dismiss the case as against the Secretary and the Solicitor was clearly correct inasmuch as the court lacked jurisdiction of those officers. Their official residence is in Washington, D. C. The governing statute (28 U.S.C.A. § 1391(b) provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." There is no statutory authority for instituting suit against these officials elsewhere than in their place of residence.

1/ Since this was the action taken, further review on any issue of effect of the A.P.A. was not available.

This was applying well-settled law. Martinez v. Seaton, 285 F.2d 587 (C.A. 10, 1961). In Ernst, the district court had said (see record of Ernst in the files of this Court):

> The Secretary of the Interior and the Solicitor of the Department of the Interior have appeared specially by the United States Attorney and moved the court for an order quashing the return of service of summons and dismissing the complaint, upon the grounds that these Government officials are residents of the District of Columbia and such action can be brought against them only in the district of their official residence.
>
> Jurisdiction to review such decision could only be conferred by the provisions of Sec. 10 of the Administrative Procedure Act, Title 5, Sec. 1009, U.S.C., upon which plaintiff relies. This statute provides for judicial review of "agency action" of any administrative authority or agency of the United States, which proceeding, in the absence of any specific statute, may be brought "in any court of competent jurisdiction". It is well settled that any action under the provisions of this Act against a public official of the United States in his official capacity can only be maintained at the official residence of such official, within the meaning of Title 28, Sec. 1391, U.S.C.A. Blackmar vs. Guerre, 342 U.S. 512, 516; Trueman Fertilizer Co. vs. Larson, (CCA 5), 196 F.2d 910; Nesbitt Fruit Products Inc., vs. Wallace, 17 F.Supp. 141; Torres vs. McGranery, 111 F.Supp. 241; Muerer vs. Ryder, 137 F.Supp. 362; Clement Martin vs. Dick Corp., 97 F.Supp. 961.
>
> Compare Wilson vs. United States Civil Service Commission, 136 F.Supp. 104, and Kansas City Power and Light Co. vs. McKay, 225 F.2d 924, where

> actions to review agency decisions were properly in the U.S. District Court for the District of Columbia. In the Kansas City Power case the court expressly holds that the Administrative Procedure Act does not of itself establish the jurisdiction of the Federal Courts over an action not otherwise cognizable by them, or does not render competent a court which lacks jurisdiction upon any other ground (p. 933).
>
> As the official residence of the Secretary of the Interior and the Solicitor of the Department of the Interior was and is in the District of Columbia this action cannot be maintained against them in this District. See cases above cite, and Anno. Title 28, Sec. 1391, U.S.C.A., note 49.

The Supreme Court, in Blackmar v. Guerre, 342 U.S. 512, 515-516 (1952), stated:

> It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U.S.C. & 1001 et seq. Certainly there is no specific authorization in that Act for suit against the Commission [the Civil Service Commission] as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit. If the Commission's action is reviewable under § 1009, it is reviewable only in a court of "competent jurisdiction." [Footnotes deleted.]

Under these authorities, the district court lacked jurisdiction over the Secretary of the Interior.

C. The mandamus statute of 1962 did not vest the district court with jurisdiction to review actions taken under the Mining Claims Occupancy Act of 1962. - Congress in 1962 very

carefully limited the scope of the jurisdiction that it was vesting in courts outside the District of Columbia.

The 1962 Act is explicit in granting the district courts jurisdiction of any action "in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." It does not vest the courts with general jurisdiction to review decisions of such officers. The meaning of "mandamus" is made crystal clear by the committee reports to both Houses of Congress, which described the grant of jurisdiction as follows (2 U.S. Cong. News, 87th Cong., 2d sess. (1962) 2785):

> This legislation does not create new liabilities or new causes of action against the U.S. Government. The bill, as amended, is intended to facilitate review by the Federal courts of administrative actions. To attain this end, the bill does two things. First, it specifically grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision. Secondly, it broadens the venue provisions of title 28 of the United States Code to permit an action to be brought against a Government official in the judicial district (1) where a defendant resides, or (2) in which the cause of action arose, or

> (3) in which any real property involving the action is situated, or (4) if no real property is involved in the action, where the plaintiff resides. This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U. S. District Court for the District of Columbia.

The use of the term "mandamus" in the committee report and in the Act was intentional for the exact purpose of not expanding the scope of review of administrative decisions. It was written in response to a recommendation of the Department of Justice (Id. 2788-2789), as follows:

> While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the "mandamus" power and specifically limit its exercise to ministerial duties owed the plaintiff. Should the language be applied to discretionary acts of Federal officers, the judicial branch would be invading the executive or legislative function in violation of the doctrine of separation of powers. Clearly, the judiciary can compel executive action (or legislative action) only where there is an absolute obligation to act in connection with which no discretion exists.

Limitation of the 1962 Act to ministerial duties was recognized in Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (C.A. 10, 1966), as follows (at p. 367):

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. Huddleston v. Dwyer, 10 Cir., 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809.

The nature of mandamus was declared in the early case of Decatur v. Paulding, 14 Pet. 497 (1840), where the Supreme Court held that mandamus could not be awarded to compel the Secretary of the Navy to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction. Chief Justice Taney, speaking for the Court, said (14 Pet. at p. 514):

> The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress, or by resolution, are not mere ministerial duties. The head of an

> executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act.

This rule, especially as applied to public land matters, is sustained by a long and unbroken line of authorities. Litchfield v. Register and Receiver, 9 Wall. 575 (1869); Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); West v. Hitchcock, 205 U.S. 80 (1907); Ness v. Fisher, 223 U.S. 683 (1912); Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919); Hall v. Payne, 254 U.S. 343 (1920); Work v. Rives, 267 U.S. 175 (1925); Wilbur v. United States, 281 U.S. 206 (1930); United States v. Wilbur, 283 U.S. 414 (1931).

The function of the writ of mandamus was summarized in Wilbur v. United States, 281 U.S. 206 (1930). There, Mr. Justice Van Devanter, speaking with his usual precision, said (at pp. 218-219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Here it very clearly cannot be said that the Mining Claims Occupancy Act of 1962 imposed on the Secretary of the Interior any such ministerial duty to grant any rights in the public domain to Walker or to grant him any kind of a hearing on the subject.

II

REJECTION OF THE DEPARTMENTAL DECISION WAS NOT WARRANTED

A. Congress did not confer upon Walker a litigable right to claim an interest in the public domain. - The district court said (R. 133):

> When a person enters upon the public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under any of the many laws governing

> entries on public lands, such as the Mining Claim Occupancy Act, and such person perfects his entry by compliance with the applicable Act of Congress he then acquires a right which the Administrative Procedure Act is designed to safeguard from arbitrary, capricious and illegal action of executive and administrative agencies. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966); Adams v. Witmer, 271 F.2d (9th Cir. 1958).

This is not true here. The Mining Claims Occupancy Act is of an entirely different nature than ordinary mining or homesteading laws. An entry under that Act was precluded by the fact that it applied only to persons who had taken action continuously for at least seven years prior to the Act.

In short, the 1962 Act simply authorized the Secretary of the Interior to recognize equities of some persons who were and had been trespassers on the public lands for some years in the past. The language of the Act was designedly chosen by Congress to give the Secretary complete discretion to recognize equities to the extent he deemed appropriate. We elaborate.

The Act resulted from the fact that, for various reasons, hundreds of mining claims had "been used, sometimes for generations, as actual homesites, and as a principal place of residence, by families which have inherited them from original locators or paid value for the improvements, in reliance upon

the customs prevailing in the area that effective title could be obtained by gift, inheritance, or quitclaim deed" but were, in fact, not now used for mining and were invalid for various reasons. Attention was focused on these trespassers on the public domain upon passage of the Multiple Use Act of 1955, 69 Stat. 367, 30 U.S.C. secs. 601-615. That Act was designed, inter alia, to correct the widespread abuse of the mining laws by the use of mining locations for nonmining purposes. It provided (30 U.S.C. sec. 612(a)) that mining claims thereafter located should not be used for other than mining purposes and it contemplated stricter enforcement of the mining law limitations.[2/] The 1962 Act was passed to alleviate the hardship resulting from such enforcement.[3/] But the extent of relief and the persons entitled were strictly limited and complete discretionary authorization was given to the Secretary of the Interior (together with the heads of other executive agencies using particular lands). The basic provision of Section 1 is that the

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2/ That Act also excluded from the operation of the mining laws common varieties of materials, such as sand, stone, etc.

3/ In 1962, the Senate Report (No. 1984, 87th Cong., 2d sess., p. 4) said that the 1955 Act "has resulted in an intensified program to eliminate uses of mining claims inconsistent with mining purposes."

Secretary "may convey * * * an interest, up to and including a fee simple, in and to an area of not more" than five acres "but no more than is occupied by the claimant." The Secretary was then given complete freedom to select the quality of title-fee, life estate, 10 year lease, and/or the quantity of land to be given. Possible beneficiaries--"qualified applicants"--are (1) a person in residential occupation in October 1962 of (2) improvements which constitute for him a principal place of residence and (3) of which he or his predecessors in interest were in possession for not less than seven years prior to 1962, i.e., when the 1955 Act became effective. The statute again used "may" on Section 3 dealing with land used by some other government unit, here the Forest Service. The Secretary was authorized to fix a price of the interest to be conveyed, excluding value of improvements placed on the land by the beneficiary or his predecessors, and in doing so to take into consideration any "equities of the applicant." Mineral interests in lands conveyed were reserved for the period of the conveyance. The Act was permissive in every aspect.

The discretion of the Secretary was emphasized in Congress. Thus, the Senate Committee said the objective was "to give the Secretary of the Interior a full kit of legal tools

and the discretion, when the public interest will not be injured, to permit persons who live on mining claims for residential purposes * * * to continue to reside in their home." S. Rept. No. 1984, 87th Cong., 2d sess. (1962) p. 3. The discretionary function was explained by Senator Church, the sponsor of S. 3451, which eventually became the Act of October 23, 1962, as follows (Hearings, S. Committee on Interior and Insular Affairs, S. 3451, 87th Cong., 2d sess. (1962) p. 16):

> * * * the bill is meant to be * * * discretionary. It says at the very first sentence of the bill that the Secretary of the Interior may convey to any occupant. The purpose of that language was to convey the necessary discretion and not to make it mandatory so that it would be applicable in cases where it is not justified. (Emphasis supplied.)

See also Id., pp. 17-19. At page 30 of the hearings, Senator Church said:

> We do want to leave the departments free to make the proper determination in any given case. So we have written this in discretionary terms.

The complete discretionary authority is even more clearly stated in the debates in the House. Mr. Aspinall, the sponsor, opened discussion by saying the bill "is designed to

arm the Secretary of the Interior with discretionary authority in order to prevent hardship * * *." 108 Cong. Rec. 19645. Mr. Johnson of California emphasized: "Mr. Speaker, this is permissive legislation" (Id., p. 19647). Mr. Dingell of Michigan opposed the legislation on the ground it was a give-away of public land, and Mr. Johnson responded: "Does not the gentleman agree that the legislation is permissive?" (Id., p. 19649). After further discussion, Mr. Dingell advanced the argument that "while this measure masquerades as permissive it will in fact be nearly mandatory in effect because of political and other pressures" (Id., p. 19649). Mrs. Pfost, sub-committee chairman, in listing the protections to the public interest, contained in the bill, said: "Secondly, the authority is discretionary and the Secretary of the Interior may determine that disposition is not in the public interest" (Id., p. 19650).

Moreover, statutes, such as this one, constituting donations, gifts or bounties, are strictly construed in favor of all the public represented by the Government. District of Columbia v. Johnson, 165 U.S. 330, 339 (1897); cf. Pine Hill Co. v. United States, 259 U.S. 191 (1922). Analogous is the principle "that land grants are construed favorably to the Government,

that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. Caldwell v. United States, 250 U.S. 14, 20-21." United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957). See also Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942), United States v. Oregon &c. Railroad, 164 U.S. 526, 539 (1896).

All of these considerations demonstrate that the statute should be read to mean what it says, i.e., that some interest in the public domain can be given to Walker only if the Secretary of the Interior so concludes. Walker is not given any right to such a grant, nor are the courts authorized to re-examine the Secretary's refusal to make a grant.[4/] This is, we submit, a much clearer case than that involved in Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), where this Court held that a refusal of the Secretary to sell land under the Isolated Tracts Act "is not subject to judicial review" because the Act committed the discretion to sell to the Secretary.

4/ Thus, even if the Administrative Procedure Act were thought to apply, the exclusion when "agency action is committed to agency discretion by law," 5 U.S.C. sec. 701(a) precludes the granting of any relief in this case.

B. Walker's expressed purpose for use of the property is contradictory to the congressional purposes in passing the 1962 Act. - Throughout the administrative process, Walker asserted a desire to secure this land as a base for future mining operations. He said that "Bobbin will have to be my base of operations" and emphasized prospective gold, silver or antimony deposits in the vicinity. His first appeal devoted a major portion of its space to expression of his intent of developing mining prospects in the area (R. 50). His appeal to the Secretary repeated this theme and he charged that the Forest Service "is trying to hamper all mineral development within the National Forest" (R. 71).

The 1962 Act was not designed to promote mineral development to any extent or to enlarge other laws designed for that purpose. On the contrary, the conveyance of any minerals under the Act was prohibited. Section 7. The Act applied only to cases where the mineral interest was shown not to exist or to have been worked out. It was designed solely to protect persons from eviction from homes used for residential purposes. Walker, in attempting to subvert these purposes, is doing the very thing that the 1955 Act was passed to prevent, pursuant to

a policy re-affirmed in the 1962 Act. Walker's complaint about the policy of the Forest Service likewise contradicts the congressional understanding, which was that the 1962 Act was simply giving a priority of old time residents for land "only if it is not needed for further governmental purposes." 108 Cong. Rec. p. 19647. Congress very plainly approved the program of "both the Bureau of Land Management and the U.S. Forest Service [which] have initiated programs designed to eliminate unauthorized use of unpatented mining claims * * *." 108 Cong. Rec. p. 19648. It was also expressly stated "this proposed legislation would in no way amend the public mining laws." 108 Cong. Rec. p. 19647.

Thus, the 1962 Act was not designed to give Walker a base from which to conduct mining prospecting on surrounding property. Since that was his purpose, his application had to be rejected.

C. The departmental rejection of Walker's application was fully supported by the facts. - In the Statement, supra, we have narrated at some length all of the facts appearing in this case, including those claimed by Walker. In saying "principal place of residence," Congress was not using a word of art, nor

a technical legal term, like domicile. Rather, it was describing a home from which, in equity, some people should not be evicted. The departmental conclusion that Walker had not shown the cabin to constitute such a residence was a supportable, if not inevitable, conclusion from the facts. In this connection, it is important to remember that the controlling fact that Walker was obliged to establish in order to support his application was continuous residence of that nature for the seven years prior to 1962, i.e., since 1955. The original application is, to say the least, very sketchy as to that period but it admits residence at many other places wherever Walker's work took him. His additional assertions on appeal added little to proof of pre-1962 residency and were primarily addressed either to his mining intentions or to his post-1962 actions. He said: "It is true as stated by the Forest Service that I am at Yellow Pine more than at the mining claim * * *" (R. 51). He also seems to have had the concept that proof that he did not have a residence elsewhere proves he had a home at the Bobbin claim. Cf. R. 71. This negative inference does not follow. The conclusion is plain, we submit, that rejection of Walker's claim will not result in what Senator Church referred to as the "rather harsh

circumstances of being forced out of this homesite. If they are required to leave their modest home, they will have no place to go." Hearings, S. Comm. on Interior and Insular Affairs on S. 3451, 87th Cong., 2d sess. (1962) pp. 11-12. The bill was designed "to give relief to people in California who were threatened with eviction from their homes * * *." 108 Cong. Rec. p. 19646.[5/] The basic fact is plain that Walker lived at the Bobbin claim only when attempting to develop mining locations in the area. He did not occupy it as his general residence and there is no question of evicting him.

D. The order directing a hearing was unwarranted. - Two reasons why the directing of a hearing was not justified are (1) there is no obligation upon the Secretary to direct a hearing in such a case and (2) under the undisputed facts a hearing would be a mere formality. A requirement of a hearing in cases such as this would impose a serious impediment upon and would tend to disrupt and delay the administrative process. In Best v. Humboldt, 371 U.S. 334 (1963), the Court noted (fn. 8, p. 339) the burden that processing of mining claims alone

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5/ This referred to the original bill which related only to California but was expanded to be generally applicable.

imposes upon the nine hearing examiners assigned to such cases. Reports were made in this case in 1963 and 1964 by Vernon Dow, Valuation Engineer (Mining), by Earl Dodds, District Ranger (R. 76-80), and by Floyd Iverson, Forest Supervisor in 1965 (R. 65). Walker submitted the affidavit of the Sheriff of Valley County, Idaho (R. 75). A plenary hearing obviously would require some time of the hearing examiner to schedule, hold and report upon and would divert government employees from their normal duties for the time required. There is, we submit, no justification for such impedence of the normal activities of government personnel. In Ferry v. Udall, 336 F.2d 706, 714 (C.A. 9, 1964), cert. den., 381 U.S. 904, an attack upon rejection of an application under the Isolated Tracts Act for lack of hearing failed, this Court saying, "We know of no provision in the Isolated Tracts Act that requires such a hearing. Furthermore, there is no constitutional requirement to a right to a hearing where only a potential privilege to purchase United States land is involved."[6/] Cf. LaRue v. Udall, 324 F.2d 428 (C.A. D.C. 196

6/ This is in accord with Webster Groves Union Trust Company v. Saxon, 370 F.2d 381, 385 (C.A. 8, 1966), that: "We do not think that the Administrative Procedure Act imposes any requirement of an adversary hearing before an agency, but that it only specifies the procedure to be followed when a hearing is required by some other statute."

cert. den., 376 U.S. 907. This reasoning equally applies here. 43 C.F.R. sec. 1843.5 (R. 135) is purely discretionary and does not establish a right to a hearing. Even though its order directed a hearing, the district court recognized (R. 135) that the regulation "permits a hearing on an issue of fact, if the Secretary within his discretion sees fit to grant a hearing."

Moreover, a hearing is not required when it would serve no useful purpose. Dredge Corporation v. Penny, 362 F.2d 889 (C.A. 9, 1966). So here, the detailed facts are known and there is no dispute about them. Clearly, a hearing is not necessary simply to have the witnesses express opinions whether or not those facts show existence of a principal place of residence for the years 1955 to 1962. The problem is one of drawing the conclusion (whether it be called one of ultimate fact or law is immaterial), as to sufficiency of Walker's showing to justify equitable consideration for him. The directed hearing would, we submit, constitute pure waste of time and money.

CONCLUSION

It is submitted that the judgment below should be reversed with directions to dismiss the case.

Respectfully submitted,

CLYDE O. MARTZ,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

JAY F. BATES,
Assistant United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

APRIL 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS